

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

In re Case No. 02-55795 JRG  
3DFX INTERACTIVE, INC., Chapter 11  
Debtor.

ORDER DENYING IN PART AND GRANTING IN PART  
CARLYLE'S MOTION FOR SUBSTANTIAL CONTRIBUTION

**I. INTRODUCTION**

Before the court is Carlyle Fortran Trust's motion for allowance and payment of an administrative claim for substantial contribution. Carlyle seeks to recover \$1,847,644.81 in fees and costs under Bankruptcy Code § 503(b)(3) and (4). For the reasons herein stated, Carlyle's motion will be denied in part and granted in part.

**II. BACKGROUND**

The debtor, 3dfx Interactive Inc., filed bankruptcy on October 15, 2002. Prior to the bankruptcy filing, Carlyle Fortran Trust, a former landlord of the debtor, initiated a lawsuit against Nvidia, Nvidia directors and officers, and the debtor's directors

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**For The Northern District Of California**

1 and officers. The litigation stemmed from Nvidia's purchase of the  
2 assets of the debtor in 2001. Carlyle alleged theories of  
3 successor liability, tortious interference with contract,  
4 conspiracy, and other tort-related theories. In January 2003,  
5 Nvidia removed Carlyle's lawsuit to the bankruptcy court.

6 Carlyle's action was pending as an adversary proceeding in the  
7 bankruptcy court. However, on May 9, 2005, the reference was  
8 withdrawn and Carlyle's action is now pending in the district  
9 court.

10 The court appointed a Chapter 11 Trustee in the debtor's  
11 bankruptcy on January 23, 2003. On February 24, 2003, the Trustee  
12 filed an adversary proceeding against Nvidia. The Trustee asserted  
13 two theories of recovery: (1) fraudulent conveyance; and (2)  
14 defacto merger. The Trustee's lawsuit stemmed from the same  
15 transaction, Nvidia's purchase of the debtor's assets in 2001.

16 In addition, on September 17, 2003, the Trustee filed a  
17 complaint in state court against the directors and officers of the  
18 debtor, alleging breach of fiduciary duty, among other causes of  
19 action. The Trustee settled with the 3dfx directors and officers.  
20 On November 19, 2004, the court approved the settlement resulting  
21 in the estate recovering \$5.5 million.

22 Prior to the settlement, it is undisputed that the estate's  
23 resources were limited. Once the settlement was approved and  
24 additional funds came into the estate, Carlyle filed a motion  
25 seeking to recover \$1,847,644.81 in fees under Bankruptcy Code §  
26 503(b)(3) and (4) for substantial contribution. Carlyle asserts  
27 that it is entitled to be reimbursed for the benefit conferred upon  
28 the debtor's estate and its creditors as a result of its efforts

1 in the litigation against Nvidia.

2 Carlyle's motion met with substantial opposition from the  
3 Trustee, the Creditors' Committee, and the United States Trustee.  
4 The bases for the objections include arguments that Carlyle has  
5 been acting in its own best interest and that Carlyle's actions in  
6 this case have caused the Trustee to incur additional attorney's  
7 fees and costs. As examples of Carlyle's activity, the parties cite  
8 to Carlyle's appeal of the court's denial of its motion to dismiss  
9 the Chapter 11 bankruptcy case, Carlyle's objection to the  
10 Trustee's application to employ special counsel in the 3dfx officer  
11 litigation, and Carlyle's opposition to the settlement of the 3dfx  
12 officer litigation that resulted in the \$5.5 million coming into  
13 the estate. The opposition argues that Carlyle should not be  
14 entitled to recover for substantial contribution when it has been  
15 acting solely to benefit itself and its actions have caused the  
16 estate to incur additional attorney's fees and costs.

17 At the hearing on the motion, Carlyle retreated from its  
18 position that it was entitled to approximately \$1.8 million in fees  
19 and costs for substantial contribution. Carlyle's counsel argued  
20 that at the very least, Carlyle should be entitled to recover costs  
21 it incurred at the request of the Trustee who lacked the funds to  
22 cover such costs.

23 Carlyle specifically asked that it recover as a substantial  
24 contribution its advances for the retainer of experts jointly  
25 retained by Carlyle and the Trustee, costs for depositions taken  
26 at the request of the Trustee, and costs in connection with  
27 documents obtained as part of the Nvidia litigation. In addition,  
28 Carlyle requested that one-half of its fees for the depositions

1 taken at the request of the Trustee be reimbursed. Carlyle's  
2 counsel stated that Carlyle is seeking an interim award and that  
3 it does not expect to be awarded the \$1.8 million requested in its  
4 motion.

5 At the hearing on this motion, the Trustee informed the court  
6 that requests for Carlyle to take deposition were made because the  
7 estate was short on funds. In addition, on May 18, 2005, the court  
8 received a faxed letter from the Trustee. The letter was sent to  
9 all parties in interest. In the letter the Trustee outlined the  
10 available funds in the estate and potential payouts with respect  
11 to fee requests.

12 As part of the letter the Trustee also included statements  
13 concerning Carlyle's request. While the Trustee stated that "the  
14 Estate takes no position other than what has earlier been filed  
15 with respect to ... the Motion for Substantial Contribution brought  
16 by [Carlyle]," the Trustee goes on to state the following:

17 [I]n trying to find a middle ground with respect to all  
18 of this, I have tried to compute what the Trustee would  
19 consider to be a fair payment to Carlyle at this point. To  
20 do this I have pulled from the affidavits filed by Carlyle and  
from the Court transcript itself the figures for the various  
sums that Carlyle proposed, at the very least, be reimbursed  
to them for their direct costs to date in this matter.

21 These direct costs were composed primarily of three  
22 items. First are Carlyle's costs for retention of experts  
(some, indeed, which have been retained jointly with the  
23 Trustee). The sum for the retentions of these experts is,  
according to the transcripts at page 13 and 14 of Carlyle's  
Substantial Contribution Motion, a figure of \$122,255.19.  
24 Secondly, from page 13 of the same Motion, there are the  
direct deposition costs that Carlyle paid in connection with  
the litigation totaling \$74,116.07. Finally, and for the  
25 third component of these costs, are the sums expended in  
connection with document duplication and retrieval, and from  
26 page 12 of their Motion one can discern that this figure was  
\$64,474.93.

27 [Carlyle's counsel], in her recitation to the Court at  
28 the recent hearing on fees, offered a round approximation of  
these numbers .... In order that the calculations be exact,

1 I have pulled these numbers from the Motion on Substantial  
2 Contribution and summed the three figures. They total  
\$261,146.19.

3  
4 **III. DISCUSSION**

5 Bankruptcy Code § 503(b) (3) and (4) provides in relevant  
6 part:

7 (b) After notice and a hearing, there shall be allowed  
8 administrative expenses, other than claims allowed  
under section 502(f) of this title, including...

9 (3) the actual, necessary expenses, other than  
10 compensation and reimbursement specified in  
paragraph (4) of this subsection, incurred by...

11 (D) a creditor ... in making a substantial contribution  
in a case under Chapter 9 or 11 of this title;

12 ...

13 (4) reasonable compensation for professional services  
14 rendered by an attorney ... of an entity whose  
expense is allowable under paragraph (3) of this  
15 subsection, based on the time, the nature, the  
16 extent, and the value of such services, and the cost  
of comparable services other than in a case under  
this title, and reimbursement for actual, necessary  
expenses incurred by such attorney ....

17 To be entitled to payment under § 503(b), a creditor must have  
18 made a "substantial contribution" to the reorganization of the  
19 debtor. In re Cellular 101, Inc., 377 F.3d 1092, 1096 (9<sup>th</sup> Cir.  
20 2004). The principal test of substantial contribution is "the  
21 extent of the benefit to the estate." Id. (citing In re Christian  
22 Life Ctr., 821 F.2d 1370, 1373 (9<sup>th</sup> Cir. 1987); In re Consol.  
23 Bancshares, Inc., 785 F.2d 1249, 1253 (5<sup>th</sup> Cir. 1986)).

24 The Ninth Circuit recognizes that "services which  
25 substantially contribute to a case are those which foster and  
26 enhance, rather than retard or interrupt the progress o[f]  
27 reorganization." Id. at 1096-97 (quoting In re Consol. Bancshares,  
28 Inc., 785 F.2d at 1253). "[A] creditor's attorney must ordinarily

1 look to its own client for payment, unless the creditor's attorney  
2 rendered services on behalf of the reorganization, not merely on  
3 behalf of his client's interest, and conferred a significant and  
4 demonstrable benefit to the debtor's estate and the creditors."  
5 In re Consol. Bancshares, Inc., 785 F.2d at 1253 (citation  
6 omitted).

7 While much is made of Carlyle's actions during this case,  
8 which it is argued have caused serious detriment to the estate,  
9 Carlyle has fronted some costs in this case at the request of the  
10 Trustee. Without Carlyle's participation, the Trustee's continued  
11 involvement in the Nvidia litigation would have been seriously  
12 hampered due to a lack of funds. Thus, the costs in the three  
13 categories outlined by Carlyle, which the Trustee agreed were not  
14 unreasonable, were rendered in part for the benefit of the estate.  
15 These cost outlays have facilitated the continuance of the Nvidia  
16 litigation. However, because the services jointly benefitted  
17 Carlyle, these costs for joint experts, direct depositions costs,  
18 and document reproduction and retrieval, should be split between  
19 the two parties. Thus, Carlyle is entitled to recover \$130,573.10  
20 of the \$261,146.19 in costs requested.

21 Carlyle also seeks to recover one-half of its attorney's fees  
22 for depositions and asserts that \$597,713.99 in attorney's fees  
23 were incurred in preparing for and participating at depositions.  
24 In reviewing the evidence submitted by Carlyle, the court is unable  
25 to discern the exact amount of reasonable attorney's fee associated  
26 with the depositions that may have been taken at the Trustee's  
27 request when the estate was short on funds. The court does not  
28 believe that Carlyle's request of one-half of all deposition fees

1 is reasonable since Carlyle admits that there were depositions in  
2 which the Trustee took the lead in questioning witnesses. Thus,  
3 the court will deny without prejudice Carlyle's request to recover  
4 one-half of its attorney's fees related to depositions because  
5 Carlyle has not met the burden of demonstrating substantial  
6 contribution to the estate.

7 As for all other fees and costs that Carlyle seeks to recover  
8 as part of its substantial contribution motion, the court will deny  
9 them without prejudice. At the hearing Carlyle reduced its request  
10 to only those fees and costs which were borne at the request of the  
11 Trustee. Given the oppositions and the posture of the case, the  
12 court finds Carlyle's remaining request to be premature at this  
13 time in terms of substantial contribution to the estate.<sup>1</sup>

14 **IV. CONCLUSION**

15 For the reasons herein stated, the court concludes Carlyle is  
16 entitled to recover \$130,573.10, related to one-half of the costs  
17 which have directly facilitated the Trustee's involvement in the  
18 Nvidia litigation. All other fees and costs are denied without  
19 prejudice.

20 DATED: \_\_\_\_\_

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22  
23 JAMES R. GRUBE  
UNITED STATES BANKRUPTCY JUDGE

24  
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27 \_\_\_\_\_  
28 <sup>1</sup> Carlyle's Motion to Strike Discussions of Negotiations is overruled without  
prejudice because it is not relevant to the decision issued by the court.

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CERTIFICATE OF SERVICE - page 1

I, the undersigned, a regularly appointed and qualified Judicial Assistant in the office of the Bankruptcy Judges of the United States Bankruptcy Court for the Northern District of California, San Jose, California hereby certify:

That I am familiar with the method by which items to be dispatched in official mail from the Clerk's Office of the United States Bankruptcy Court in San Jose, California processed on a daily basis: all such items are placed in a designated bin in the Clerk's office in a sealed envelope bearing the address of the addressee, from which they are collected at least daily, franked, and deposited in the United States Mail, postage pre-paid, by the staff of the Clerk's Office of the Court;

That, in the performance of my duties, on the date set forth below, I served the **ORDER DENYING IN PART AND GRANTING IN PART CARLYLE'S MOTION FOR SUBSTANTIAL CONTRIBUTION** in the above case on each party listed below on the next page by depositing a copy of that document in a sealed envelope, addressed as set forth, in the designated collection bin for franking, and mailing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on \_\_\_\_\_ at San Jose, California.

\_\_\_\_\_  
LISA OLSEN

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

CERTIFICATE OF SERVICE - page 2

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